No. 86-1296

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

UNITED AIR LINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS

1. Whether pre-hire pilot trainees who failed to report to work on their first day of employment, never were on United's payroll, and never performed work for United, are "employees" under the Railway Labor Act, which specifically defines that term as "every air pilot or other person who performs any work as an employee or subordinate official of such carrier . . . , subject to its . . . continuing authority to supervise and direct the manner of rendition of his service," 45 U.S.C. § 181?

2. Whether the court of appeals exceeded its authority by reversing, based on the undisputed facts as found by the district court, the district court's application of an erroneous legal standard under the Railway Labor Act's definition of "employee," 45 U.S.C. § 181?

STATEMENT REQUIRED BY RULE 28.1

Respondent United Air Lines, Inc. is a wholly owned subsidiary of Allegis Corporation (formerly UAL, Inc.), which has no parent company.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, United Air Lines, Inc. ("United"), opposes the Petition for Writ of Certiorari by Air Line Pilots Association, International ("ALPA"). Recognizing the requirements of Rule 17.1 of this Court, ALPA asserts that this case has "widespread importance" in the airline industry because it concerns the rights of "newly hired workers" and the scope of "permissible carrier coercion" under the Railway Labor Act, 45 U.S.C. §151 *et seq.* ("RLA" or "Act"). Pet. at 2.

In fact, however, this case is simple and straightforward, and involves nothing more than an interpretation of the RLA's explicit definition of the word "employee." *See* 45 U.S.C. §§151, Fifth, 181. As it relates to the peculiar facts of this case, this issue, stripped to its essentials, is whether the so-called "Group of 500" (a group of pre-hire United pilot trainees) achieved "employee" status under the Act. If, as the Seventh Circuit correctly held below, they did not achieve that status, they neither enjoy rights under the RLA nor may obtain a remedy under that Act for the supposed acts of "carrier coercion" that ALPA alleges were inflicted upon them by United.

This is precisely what the court of appeals held in this case. Because the unanimous decision below correctly applies the governing legal principles to the undisputed relevant facts as found by the district court and is fully consistent with the decisions of this Court and other courts of appeals, including most recently *Nelson v. Piedmont Aviation, Inc.*, 750 F.2d 1234 (4th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985), the Petition presents no issue warranting review by this Court and should be denied.

COUNTERSTATEMENT OF THE CASE

This case arises out of a labor dispute between ALPA and United under the RLA. In that dispute, which culminated in a costly 29-day pilots' strike against United in 1985, ALPA sought to enhance the economic interests of its members, while United sought to maintain its market position in the highly volatile and competitive post-deregulation airline industry. (App. 5a, 61a-62a).[1] One of the issues litigated following the conclusion of the strike concerned the status of a group of pre-hire pilot trainees

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[1] In particular, United was burdened with a pay scale under which pilots could earn in excess of $150,000 annually, while comparable pilots flying for some United competitors earn

(Footnote continued on following page)

known as the "Group of 500," most of whom, due to coercive pressure from ALPA (App. 70a, 79a, 117a), became participants in the dispute by refusing to report for their first day of employment on May 17, 1985, which also was the first day of the strike.

Although ALPA repeatedly refers to the Group of 500 as "newly-hired pilots" or "employees" who had a right to strike against their "employer," *see* Pet. at i, 2, 7, 8 & *passim*, the Seventh Circuit squarely held, as discussed below, that the "500" were *not* employees because they never performed any work for United. Thus, despite ALPA's claim that this case raises the issue of "carrier coercion under the RLA," Pet. at 2, 13-16, no such issue is present here. Rather, as the court below recognized in full accordance with other courts, the "500," as non-employees, simply were not entitled to the protections afforded employees under the RLA. *See infra* pp. 6-11.

Selection of what came to be the Group of 500 began in 1984, when United implemented a program (its first since 1977-79) to screen and train a pool of individuals from which it later could draw pilots to fill entry-level second officer positions as needed. (App. 63a). Actual employ-

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(Footnote 1 continued)

no more than $75,000. (App. 62a; Def. Ex. 144 pp. 7-8, 171). Although ALPA agreed during the 1984-85 negotiations to a new-hire pay scale that would more realistically reflect market conditions, negotiations broke off over, and the strike was precipitated by, the parties' disagreement as to when the new scale would "merge" with (i.e., equal) incumbent rates; ALPA sought a significantly shorter merger period, which was unacceptable to United because it would have effectively blunted the benefit of the lower new-hire rates. (App. 80a-81a). Thus, the strike was not, as contended by ALPA, "over United's demand for a reduced pay scale for newly-hired pilots" or "over [the Group of 500's] pay scale," Pet. at 2, 6, but rather over ALPA's efforts to preserve the higher-than-market salaries enjoyed by incumbent United pilots.

ment of these pre-trained applicants was to be delayed until "United had secured a cost competitive agreement with ALPA." (App. 65a). Thus, applicants selected for the pre-hire training program (the Group of 500) each executed an identical "Flight Officer Training Agreement" in which they agreed that "[d]uring this training, I understand that *I will not be an employee of United Airlines* and will receive no compensation from United other than expense money." (App. 65a, emphasis added, quoting Def. Ex. 140; *see also* App. 102a-103a). In early Spring 1985, United began to extend offers of employment to the Group of 500 to commence on May 17, 1985. These offers made clear that the individuals accepting were expected to report for work on that date "whether or not there was a strike." (App. 67a-68a).

The district court unequivocally found as a matter of fact (and, as discussed *infra* pp. 12-13 & note 11, without challenge by ALPA) that the Group of 500 never satisfied the RLA statutory definition of "employee" prior to May 17, 1985, their first assigned day of employment. (App. 65a-66a, 103a, 104a).[2] For example, at no time prior to May 17, 1985 did any member of the Group of 500 enter on United's payroll or receive a seniority number or an assignment to a line position. (App. 69a).[3] The trial court's

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[2] Pursuant to the 1936 amendments extending the RLA to the airline industry, 49 Stat. 1189, the Act applies to "every air pilot or other person *who performs any work as an employee* or subordinate official of [a common carrier by air], *subject to its . . . continuing authority to supervise and direct the manner of rendition of his service.*" 45 U.S.C. §181 (emphasis added), *quoted in* App. 43a. Section 1, Fifth provides more generally, but in similar fashion, that the term "employee" as used in the Act "includes every person *in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee* or subordinate official . . . ." 45 U.S.C. §151, Fifth (emphasis added).

[3] In the trial court, ALPA itself stipulated that the Group of 500 were merely "pilot candidates" who never entered onto United's pilot seniority list. (Stip. ¶36).

findings also made clear that the "500" knew well in advance of May 17, 1985 that United viewed them "as a pool of trained replacements for striking pilots" (App. 69a), and that United repeatedly informed them that, to become United employees, they had to report to work on May 17 for their assigned first day of employment. (App. 67a-69a).[4] Notwithstanding the foregoing, however, the district court also held that the Group of 500 automatically became employees of United on May 17 simply because they had previously accepted employment offers "effective" that date. (App. 67a, 104a). It therefore ordered United to accord them "the status of employees on inactive status" and to accord them the "preferential rehire rights" to which permanently replaced employees are entitled. (App. 126a-128a).[5]

The Seventh Circuit agreed with the district court that none of the Group of 500 attained "employee" status prior to May 17, 1985, but reversed the district court's holding that the non-reporting members of the Group achieved that status on May 17. Noting that, under the statutory definition, "the district court refused to find that the Group of 500 were employees during their training period" and that "ALPA does not contest this conclusion," the court of appeals emphasized:

> There is no dispute regarding the factual findings made by the district court surrounding the Group

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[4] The trial testimony of ALPA's own Group of 500 witnesses confirmed that they were not employees during their training and that they knew that they had to report on May 17, 1985 to begin their service with United and become "employees." (Tr. 165, 185, 217, 220-22; *see also* Tr. 1381-82, 1390, 1395, 1404-05 (testimony of other Group of 500 members)).

[5] United did not move to stay the district court's Order pending appeal. To the contrary, pursuant to the Order, it allowed the "500" to complete their training as positions opened and assigned them to line pilot service, where they remain to this day.

> of 500; rather, the issue is whether, given these facts, the court properly applied the RLA to conclude that the Group of 500 were United employees as of May 17. In other words, it is . . . a question of whether the proper legal standard was applied.

(App. 42a). After reviewing the statutory definition of "employee" under the RLA and the authorities cited by the parties (including the authorities cited by ALPA in its Petition to this Court), the court of appeals concluded that the Group of 500 failed to perform work for United under United's supervision as required by the Act, and therefore did not become United employees on May 17. (App. 44a, 47a-48a). Subsequently, the Seventh Circuit also unanimously denied ALPA's Petition for Rehearing and Suggestion for Rehearing In Banc, wherein ALPA raised the same arguments set forth in the instant Petition to this Court. (App. 132a).

ARGUMENT FOR DENIAL OF THE WRIT

I. THE WRIT SHOULD BE DENIED BECAUSE THE SEVENTH CIRCUIT'S APPLICATION OF THE LEGAL STANDARD DEFINING "EMPLOYEE" UNDER THE RLA IS FULLY CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE OTHER COURTS OF APPEALS.

1. ALPA's Petition fails to state "special and important reasons" warranting this Court's review of the Seventh Circuit's unanimous holding concerning the non-"employee" status of the Group of 500. S. Ct. Rule 17.1. To the contrary, that holding specifically relied upon, and is fully consistent with, the relevant decisions of this Court as well as those of the other courts of appeals and the National Mediation Board ("NMB"). *See Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947) (under virtually identical definition of "employee"

in FLSA,[6] brakeman trainees were not employees where they never displaced regular employees, never expedited the employer's business, and never received any compensation until they were hired from hiring list); *Nelson v. Piedmont Aviation, Inc.*, 750 F.2d 1234, 1236 (4th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985) (rejecting plaintiff's "invit[ation] . . . to participate in a creative exercise in statutory redraftsmanship" of the RLA definition of employee; "the statutory language does not admit of doubt. At the time of his application to Piedmont, [plaintiff] was not 'in the service of a carrier' and did not 'perform any work' for an airline as specified by 45 U.S.C. § 151, Fifth."); *Donovan v. American Airlines, Inc.*, 686 F.2d 267 (5th Cir. 1982) (individuals in training as sales agents and flight attendants are not "employees" under FLSA where they never went on airline's payroll and never displaced, substituted for, or supplemented regular airline employees); *International Longshoremen's Ass'n v. North Carolina State Ports Auth.*, 370 F. Supp. 33, 40 (E.D.N.C. 1974), *aff'd*, 511 F.2d 1007 (4th Cir. 1975) (per curiam) (noting that "the employee must be in the service of a carrier and the work performed must bear a direct relationship to the transportation activities of the . . . carrier").

Despite ALPA's refusal to recognize the existence of these cases in its Petition, each squarely supports the holding below under virtually identical factual circumstances. Given the Seventh Circuit's thorough discussion of these authorities (App. 46a-48a & n.19), United need not belabor the issue here by reiterating their facts and holdings.

2. None of the cases cited by ALPA in its Petition conflicts with either the holding below or the line of

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[6] The Fair Labor Standards Act ("FLSA"), quite like the RLA, defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e). Indeed, if anything, the FLSA definition is *broader* than that under the RLA. *See supra* note 2.

authority on which it relies. Indeed, the Seventh Circuit thoroughly examined each of ALPA's cases and properly distinguished them as inapposite to the case at bar.

Thus, in *Pennsylvania R. Co. v. Day*, 360 U.S. 548 (1959), a case on which ALPA places its primary reliance, *an employee*, before retiring, filed a grievance under the terms of his collective bargaining agreement seeking compensation allegedly due to him "*for work performed while on active duty.*" *Id.* at 551 (emphasis added). Thus, contrary to ALPA's mischaracterization of this Court's decision (Pet. at 8), *Day* did not hold that a retiree is an "employee" under the RLA definition or that the courts are free to ignore the statutory language. To the contrary, *Day* stressed that the National Railroad Adjustment Board possessed continued jurisdiction over the retiree's grievance because the grievance "ar[ose] out of the *relationship between carrier and employee* . . . . The purpose of the Act is fulfilled if the claim itself arises out of the *employment relationship* which Congress regulated." *Id.* at 551-52 (emphasis added). *See also Air Line Pilots Ass'n, Int'l v. Alaska Airlines, Inc.*, 735 F.2d 328 (9th Cir. 1984) (quoting *Day* and holding that retiree's grievance over calculation of retirement benefits under the collective bargaining agreement was arbitrable), *cited in* Pet. at 9. Plainly, therefore, *Day* and *Alaska Airlines* have no applicability here, where no "employment relationship" as defined by the Act was ever established. The Seventh Circuit easily and correctly found those cases to be inapposite. (App. 45a).

Similarly inapposite, as stressed by the decision below (App. 48a n.19), is *Nashville, C. & St. Ry. v. Railway Employees' Dep't*, 93 F.2d 340 (6th Cir. 1937), *cert. denied*, 303 U.S. 649 (1938) (furloughed employees were "employees" under the RLA where they had performed services for their employer, retained their seniority rights, were only on temporary furlough, and were already back at work by the time the case was tried). Indeed, the Sixth Circuit placed great emphasis in that case on the

"particularity" of the RLA definition of "employee" and on the need "to examine that definition with care." *Id.* at 342. Accordingly, ALPA's repeated efforts to portray *Nashville Ry.* as a case which cast aside the statutory definition as mere so-called "terms of art" (Pet. at 9, 10) fall short of reality. *See Nelson*, 750 F.2d at 1237 ("[*Nashville Ry.*] does not expand the meaning of 'employee' under the RLA").

Equally unavailing is *NLRB v. New England Tank Indus., Inc.*, 302 F.2d 273 (lst Cir.), *cert. denied*, 371 U.S. 875 (1962), *cited in* Pet. at 14, which relied on the unique unfair labor practice provisions of the National Labor Relations Act ("NLRA"), 29 U.S.C. §151 *et seq.*, and the particular factual context the court faced in that case. *Id.* at 277-78. The Seventh Circuit correctly distinguished *New England Tank* on the basis that the NLRA definition of "employee" is not controlling under the RLA given the latter's specific definitional language. (App. 47a & n. 19).[7]

Finally, in its effort to demonstrate a conflict between the decision below and the determinations of the NMB, ALPA's Petition turns those determinations on their heads. For example, contrary to ALPA's novel "interpretation" of *Air Micronesia*, 10 N.M.B. 11 (1982), that case squarely supports the Seventh Circuit's decision, as the opinion below recognized. (App. 45a-46a). In *Air Micronesia*, it was contended that trainees who (in contrast to the Group of 500) had completed their training were eligible to vote as "employees" because they "ha[d] a reasonable expectation of employment." *Id.* at 12. The NMB *rejected* this conten-

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[7] In *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), this Court expressly rejected the notion that the RLA contains prohibitions against employer conduct "comparable" to the prohibitions set forth in the NLRA. *Id.* at 385 n.20. "The [NLRA] cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Id.* at 383.

tion. Explicitly framing the issue as whether individuals "who have not yet worked for the carrier . . . are eligible to vote," and quoting with emphasis the "performs-any-work" and "subject-to-supervision" portions of the Section 201 definition of "employee," the NMB held that trainees who "have never been on the carrier's payroll as working employees" are not "employees" under the RLA, notwithstanding their alleged " 'reasonable expectation' of future employment." *Id.* at 14.[8] Similarly distinguishable is *Scheduled Skyways, Inc.*, 10 N.M.B. 488 (1983),[9] where "the employees in training [were] receiving the same pay and benefits as other pilots," "report[ed] to the same supervisory officials and [were] subject to the same policies and procedures as pilots who ha[d] completed their training," and had commenced full on-line flying duties for the carrier by the time the NMB issued its decision. *Id.* at 490-91.

3. ALPA argues that the effect of the decision below is to deny the "500" the right to strike in violation of the "purpose" of Section 2, Fourth of the RLA. Pet. at 13-16. Thus, according to ALPA, the court of appeals' decision "serves an antiunion purpose" because it "authorize[s] carriers to obtain involuntary, coerced strikebreakers." Pet. at 14, 15. This argument is merely a variation of ALPA's disagreement with the court's holding that the "500" did not achieve "employee" status on May 17. Because the

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[8] The courts have likewise uniformly rejected the "expectation-of-employment" theory. *See, e.g., Walling*, 330 U.S. at 149-50 (trainees not "employees," even though they completed their on-property training program and were placed on hiring list); *Donovan*, 686 F.2d at 268-69 (trainees not "employees," even though they were actually assigned base cities during training and were told to "resign from other employment and leave automobiles behind" upon commencing training).

[9] ALPA mistakenly cites the case as appearing at 12 N.M.B. 488.

Group of 500 did not achieve that status under the RLA definition, they were not entitled to the protections afforded to "employees" by Section 2, Fourth, 45 U.S.C. § 152, Fourth. In so holding, the Seventh Circuit's decision is fully consonant with the decisions of the other courts of appeals. *See, e.g., Nelson*, 750 F.2d at 1236-37 (individual who does not meet statutory definition of "employee" is "plainly not subject to the protections of [the RLA]"); *NLRB v. North Arkansas Coop., Inc.*, 446 F.2d 602, 610 (8th Cir. 1971) (similar holding under NLRA); *NLRB v. Wheeling Elec. Co.*, 444 F.2d 783, 784 (4th Cir. 1971) (same).

II. THE DECISION BELOW FULLY COMPORTS WITH FED. R. CIV. P. 52(a) AND THE STANDARDS THEREUNDER AS RECENTLY REITERATED BY THIS COURT.

To create a reviewable issue where none exists, ALPA also claims that the Seventh Circuit's unanimous decision exceeded the permissible scope of appellate review under Fed. R. Civ. P. 52(a) and this Court's recent holding in *Icicle Seafoods, Inc. v. Worthington*, 106 S. Ct. 1527 (1986). This argument, which the Seventh Circuit explicitly considered and rejected in both its original decision (App. 41a-42a) and its denial of ALPA's Petition for Rehearing (App. 131a-132a; *see* ALPA's Pet. for Rehearing at 6-10), is frivolous.

1. Most important, ALPA's argument that the court of appeals made *de novo* findings of fact is belied by the district court's decision itself. Indeed, noting the RLA's dual definitional requirements for "employee" status – i.e., that the individual be (1) "in the service of the carrier" and (2) "subject to [the carrier's] continuing authority to supervise and direct the manner of rendition of his services" (App. 102a, quoting 45 U.S.C. §151, Fifth) – the district court unequivocally found as a matter of fact that the "500" never satisfied either component of the statutory definition. (App. 102a-103a). Rather, the district court held,

based on its mistaken view of the legal standard imposed by the RLA definition, that the "500" were employees as of May 17 *despite* their failure ever to report for work. (App. 103a-104a). Thus, the district court repeatedly referred to the Group of 500 as "student pilots" and "trainees" throughout its findings of fact and conclusions of law. (*See* App. 57a *passim*). ALPA also conveniently ignores the district court's express factual findings that "United did not want the [trainees] 'on the property' while the negotiations were in progress" (App. 64a) and that:

> United did not assign any member of the Group of 500 to the line, or provide them with final seniority numbers prior to May 17, 1985, whether or not they completed their initial training, whether or not they completed their refresher training, or whether or not they completed their IOE [initial operating experience].

(App. 70a).

Thus, the court of appeals had no reason to remand this case after reversing the district court's erroneous legal conclusion. To the contrary, because "[t]here is no dispute regarding the factual findings made by the district court surrounding the Group of 500" (App. 42a), the court of appeals accepted those findings as required by Rule 52(a), *Icicle*, and *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982), and merely applied the proper legal standard of "employee" status under the RLA.[10]

2. Moreover, ALPA may not at this late date undo the district court's factual findings. Until its Petition for Rehearing below, ALPA repeatedly relied upon and

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[10] In citing *Swint*, ALPA overlooks that this Court's holding turned on the fact that the Fifth Circuit "rejected the District Court's finding [and] made its own findings." 456 U.S. at 284. Here, by contrast, the court of appeals specifically relied upon and adopted the district court's findings "after having reviewed the entire evidence." (App. 4a n.1, 41a-44a, 48a n.19).

adopted the district court's finding that the "500" became employees on (but not before) May 17, arguing in the court of appeals that this finding was "amply supported and must be sustained." ALPA Opening Brief dated Jan. 6, 1986 at 32; *see also id.* at 33. As the decision below observed: "[T]he district court refused to find that the Group of 500 were employees during their training period. ALPA does not contest this conclusion." (App. 43a; *see also* App. 42a).[11]

Even if ALPA could properly raise such factual issues at this stage in the litigation, however, its contentions would have to be rejected. For example, although ALPA relies on the fact that 10-12 of the Group of 500 had performed their initial operating experience ("IOE"), the district court never found that IOE was "work," under either the contract or the RLA definitions of "employee"; to the contrary, the district court found that IOE was a prerequisite "to become fully qualified to engage in line flying" (App. 67a), and found that trainees who had IOE'd, along with the other members of the Group of 500, did *not* achieve "employee" status prior to May 17. (App. 69a-70a, 103a). *A fortiori*, trainees who had completed only their initial qualifying training and therefore had not yet IOE'd also could not have become "employees." *See* Pet. at 19. In any event, even assuming *arguendo* that some of the "500" had completed their training prior to May 17 and had become

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[11] In fact, prior to its Petition for Rehearing before the Seventh Circuit, ALPA never even contended that the "500" satisfied the statutory definition of employee prior to May 17. *See* ALPA's Post-Trial Proposed Findings Of Fact And Concl. Of Law at pp. 55-65, 113-14. In its post-trial Motion To Amend (dated August 8, 1985), ALPA specifically relied upon Judge Bua's holding "that the members of the Group of 500 were employees *as of May 17, 1985.*" (Motion at 2, ¶1, emphasis added; *see also* Supporting Mem. at 1). In its August 25, 1985 Memorandum In Opposition to United's Motion To Amend, ALPA likewise asserted that "*the Group of 500 became employees on May 17.*" (Mem. In Opp. at 3, 4, 6, emphasis added).

qualified as pilots, having done so would not equate with being an "employee," either logically or as a matter of law. *See, e.g., Walling*, 330 U.S. at 153 (graduates of training school who were trained on the carrier's property and then placed on hiring list merely "consititute[d] a labor pool from which the railroad could later draw its employees").

Thus, although ALPA now purports to cite various "facts" in arguing that the Group of 500 or some "subgroup(s)" thereof[12] might have performed work sufficient to meet the statutory definition of "employee," Pet. at 18-19, the short and simple answer to that argument is that all of this evidence was before the district court, which, as trier of fact, found ALPA's evidence insufficient under the definition. *See* Fed. R. Civ. P. 52(a). ALPA presents no reason why it should be permitted to relitigate factual issues which were previously decided in United's favor and not challenged on appeal by ALPA.

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[12] For example, ALPA now argues that a limited number of the "500" might have been RLA "employees" because they purportedly served as FOTIs ("Flight Officer Training Instructors") prior to May 17. Pet. at 18. This argument is a red herring because the FOTI is a separate job classification at United from that of pilot. In any event, the district court found that *none* of the "500" (necessarily including the FOTIs) achieved "employee" status prior to May 17, 1985.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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